

**North Jersey Newspapers Company and Local One,
Amalgamated Lithographers of America,
Graphic Communications International Union,
AFL-CIO, Petitioner. Case 22-RC-11188**

October 18, 1996

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On April 2, 1996, the Regional Director for Region 22 issued a Revised Decision and Direction of Election in this proceeding,¹ in which, inter alia, he found appropriate a unit of pressroom and prepress lithographic employees, excluding four foremen who he concluded are supervisors within the meaning of Section 2(11) of the Act. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision, asserting that the exclusion of the foremen was erroneous because they are not statutory supervisors. By Order dated June 3, 1996, the Board granted the Employer's request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has carefully considered the entire record in this case, including the briefs on review filed by the Employer and the Petitioner, and has decided to reverse the Regional Director's determination excluding the foremen from the unit. As explained below, the Petitioner has the burden of showing that the foremen are supervisors within the meaning of Section 2(11) and therefore excluded from the status of employee under the Act. We find that, at least on the basis of the evidence contained in this record, the Petitioner has not carried that burden.

¹ On March 26, 1996, the Regional Director withdrew his March 21, 1996 Decision and Direction of Election for further consideration.

On July 26, 1996, after the Board had granted review in this case, the Regional Director issued an order stating that he had decided to treat the request for the review that the Employer had filed with the Board as a motion for reconsideration of his Decision and Direction of Election and his Revised Decision and Direction of Election. In that same order, he withdrew both decisions and declared his intention "to reopen the record for the submission of additional evidence." The Employer thereafter filed "Motions to Vacate Regional Director's Order to Reopen Record and to Transfer Case to Another Region Upon The Board's Disposition of the Employer's Request for Review."

We grant the Employer's motion to vacate the Regional Director's July 26 order. Because the Board had granted review in this case, the Regional Director lacked jurisdiction either to vacate the decisions on which the Board had granted review or to reopen the record. We deny the Employer's motion to transfer the case to another Regional Office because it has not proffered sufficient evidence of bias.

The facts established on this record, more fully set out in the Regional Director's decision, are briefly stated here.² The Employer publishes 1 daily newspaper and approximately 20 weekly newspapers in the northern New Jersey area. It produces several of the weekly newspapers at its Butler, New Jersey location, the only facility involved in this proceeding. The Petitioner seeks to represent, and the parties stipulated as appropriate, a unit which includes approximately 28 pressroom and prepress lithographic employees at the Butler facility. The issue is whether, as the Petitioner contends, the four foremen should be excluded from this unit as statutory supervisors.

The Employer operates two similar presses at the Butler facility. Production occurs Monday through Friday on two shifts, the day shift and the night shift. About half of the unit employees work on each shift. Douglas Hiland, stipulated to be a statutory supervisor, is the Employer's pressroom manager. Hiland schedules the employees' hours and determines who works days and who works nights. He also assigns employees to one of the two presses. Each foreman is assigned to one press with a crew of about seven employees. They are working foremen, essentially responsible for checking the newspaper during the printing process. Specifically, they set the ink, the colors, and the rollers, and take the printing units in and out of gear. Generally, they are more experienced than the other employees and have more seniority. They also train new employees.

The foremen have additional responsibilities, which, the Petitioner asserts, establish that they possess supervisory authority within the meaning of Section 2(11) of the Act. The Regional Director agreed, concluding that the foremen have supervisory authority concerning the assignment and direction of employees, based on their reassignment and rotation of employees; their approval of time off; their authority to allow employees to leave work early; their issuance of oral disciplinary warnings and oral employee evaluations; and their participation in the hiring and firing process. He also found that the ratio of supervisors to employees would be unreasonable if Hiland were found to be the sole supervisor of the unit employees, thereby supporting a finding that the foremen are supervisors.

As the party seeking to exclude the foremen from the coverage of the Act in this proceeding, the Petitioner has the burden of proving their supervisory status. See, e.g., *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1194 (1994). We do not agree with the

² Pertinent portions of the Revised Decision and Direction of Election are attached as an appendix. We affirm the Regional Director's findings of fact therein, having concluded that they are generally consistent with the record. Where necessary, we have added relevant facts from the record. As set forth, *infra*, we do not affirm the Regional Director's analyses of his factual findings.

Regional Director that the Petitioner has met that burden.

Concerning the assignment and direction of employees, the record reflects that foremen routinely rotate unit employees working in the mailroom, which adjoins the pressroom, from the job of stacking newspapers in bundles to the job of placing the stacked newspapers on skids, and vice versa. The foremen also may reassign a mailroom employee to the pressroom to work as a roll tender³ if, for example, the regular roll tender does not show up for work. No change in the mailroom employee's wages is involved. Finally, a foreman may reassign an employee from one press to the other. The two presses operate in essentially the same way. A reassignment occurs when one press is not operating and assistance is needed on the other. Thus, a foreman may reassign a roll tender, for example, from the "down" press to the one running, as a matter of "common sense," according to Hiland. No change in wages is involved.

We find that this evidence of reassignment and rotation of employees does not demonstrate the exercise of independent judgment. At best, it indicates the kind of routine, decision-making authority typical of a non-supervisory leadman rather than true supervisory authority within the meaning of Section 2(11). See, e.g., *North Shore Weeklies*, 317 NLRB 1128 (1995); compare, *McClatchy Newspapers*, 307 NLRB 773 (1992).

With respect to the approval of time off, foremen give permission to sick employees to leave work before the end of their shift. However, there is no evidence that granting "permission" involves an exercise of independent judgment. For example, it is not at all clear from the record evidence that a foreman has the authority to *require* the sick employee to stay at work. As Hiland described it, "[I]f you're sick you're sick. You're going home." There is no evidence that a foreman has ever refused an employee's request.

Regarding disciplinary authority, the record indicates that oral warnings issued by foremen are normally approved in advance by Hiland. Hiland testified that prior oral warnings—whether issued by himself or by a foreman—are a factor in considering whether to discharge an employee. Beyond this, it is not clear what role they play in the Employer's disciplinary process. Notably, oral warnings issued by foremen are not filed or otherwise recorded for later reference. On this record, the evidence is insufficient to establish that oral warnings issued by foremen involve the exercise of independent judgment or that they have any impact on employees' job status. See, e.g., *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989).

Concerning the hiring and firing process, the record shows that one of the night-shift foremen discharged

an employee, but that discharge was specifically authorized in advance by Hiland and did not involve any degree of independent judgment on the foreman's part. Also, Jim Morse, one of the day-shift foremen, assumes some of Hiland's managerial responsibilities when Hiland is on vacation, usually about 2 weeks annually. Acting in this capacity, Morse hired an employee for the mailroom on only one or two occasions over a 6-year period. Morse's authority in this limited role substituting for the press manager on an irregular and sporadic basis does not establish Morse as a statutory supervisor. See, e.g., *Hexacomb Corp.*, 313 NLRB 983, 984 (1994).

With respect to oral evaluations of employees, foremen, in response to Hiland's specific inquiries, may advise Hiland how a particular employee is doing. There is no evidence concerning what effect the foreman's response may have on the employee's terms and conditions of employment. Such responses, accordingly, have not been shown to be effective recommendations of personnel actions and do not establish supervisory status. See, e.g., *Northcrest Nursing Home*, 313 NLRB 491, 498 (1993).

Overall, the Petitioner has failed to meet the burden of showing that the foremen possess any of the supervisory indicia set forth in Section 2(11). In these circumstances, it is unnecessary for us to consider the Regional Director's view that the supervisory-ratio factor supports the supervisory status of the foremen, because this is a nonstatutory, secondary indicium. See, e.g., *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 at fn. 2 (1996); and *Northcrest*, supra at 498–500. Because the four foremen have not been shown on this record to be supervisors, and because there is no other basis for excluding them, they must be included in the unit found appropriate.

ORDER

This proceeding is remanded to the Regional Director for further appropriate action consistent with this Decision on Review and Order.

APPENDIX

REVISED DECISION³ AND DIRECTION OF ELECTION

The Employer is engaged in the publication, sale, and distribution of newspapers at its Butler, New Jersey facility, the only facility involved herein. The Petitioner seeks to represent, and the parties have stipulated as appropriate, a unit of pressroom and prepress lithographic employees at the Employer's Butler, New Jersey facility. The parties also stipu-

³ On March 21, 1996, I issued a Decision and Direction of Election in this matter which I withdrew on March 26, 1996, in order to further consider the issues raised in this matter. Having further considered the issues, I am issuing the instant Revised Decision and Direction of Election.

³ The roll tender's job is to monitor and help change, as required, the large rolls of paper used in the printing process.

lated, and I so find, that Douglas Hiland, the Employer's pressroom manager, is a supervisor within the meaning of the Act. The Petitioner, contrary to the Employer, contends that four foremen should be excluded from the unit as supervisory. Also, the Petitioner contends that a maintenance employee should be excluded from the unit, stating at the hearing that such employees are not traditionally included in lithographic units. The Petitioner's unit numbers approximately 27 employees; the Employer's unit would include 32 employees.

With regard to the maintenance employee, the record reveals that this individual works throughout the pressroom, performing a variety of general maintenance functions. He is frequently used to help work on the machines with other unit employees, usually by stacking and undoing bundles. There is evidence, however, that the maintenance employee on rare occasions helps on the press by doing roll tender work. No other employee covers for him when he is on vacation or is otherwise out of work. He is paid hourly, like other unit employees. The maintenance employee is supervised directly by Hiland, who also has supervisory authority over the other unit employees. The maintenance employee often eats lunch with other lithographic employees; however, he does work a shift with a different start time than those employees. The maintenance employee spends about 1 day a week at another building not used by the other unit employees. As noted above, the Employer argues that this employee should be included in the unit. The Petitioner, on the other hand, argued at the hearing that the maintenance employee should be excluded from the unit, as such employees are not traditionally included in lithographic units; in its brief, however, the Petitioner simply took the position that the maintenance worker's unit placement should be based on whether he shares a sufficient community-of-interest with the other employees.

Given the foregoing, it is clear that the maintenance employee shares a community-of-interest with the other employees in the petitioned-for unit. In this regard, he is commonly supervised, works in close proximity to other unit employees and performs some unit work, as needed. See, e.g., *Virginia Mfg. Co.*, 311 NLRB 992, 994 (1993). Moreover, I note that excluding the maintenance employee from the unit would result in a residual unit of one employee, a result the Board has long found to be undesirable. *Gateway Equipment Co.*, 303 NLRB 340, 342 (1991). Indeed, in similar circumstances the Board has included such lone residual employees in a petitioned-for unit. See, e.g., *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026 (1979) (helper included in unit). Accordingly, I find that the maintenance employee is properly included in the appropriate unit found herein.

With regard to the status of the foremen, the record reveals that Hiland determines the regularly scheduled shift hours of all employees, and determines who works days and who works nights. Approximately half of the unit works on the day shift, and the other half works on the night shift.⁵ Hiland works on the day shift, starting at 8 a.m. and staying

until 5 p.m., except on Mondays when he tends to stay until 8 p.m. Hiland is also responsible for assigning employees to a particular press; the Employer utilizes two presses, both of which operate in a similar fashion. At times, certain employees are rotated from the mailroom to the press area; while Hiland testified that he determines which employees are rotated, there is some evidence in the record that the foremen also determine which employees are rotated, and determine how long the rotation period is. The record does not specify whether these rotations are scheduled or are necessitated by production requirements.

Foremen are responsible, inter alia, for checking the newspaper as it is printed. Specifically, a foreman sets ink, sets colors, sets rollers, and puts units in and out of gear. Foremen are generally more experienced than the other employees, and have more seniority. Foremen are responsible for training new employees. As for their control over the operation, foremen direct employees to go from one press to the other, when necessary. Foremen can also direct employees to leave the presses and work in the mailroom, to bundle the newspapers that have been printed, and vice versa, as production demands dictate. Each foreman heads a crew of approximately seven employees.

Employees are required to call or otherwise advise the foremen when they wish to take a sick day or vacation day; forms for time off are filled out by employees and presented to the foremen, who signs them. The record discloses that Hiland ultimately approves such requests. Foremen are authorized to allow people to leave early. Foremen also can issue verbal warnings; however, these are discussed with Hiland, usually before they are issued but sometimes not until after a foreman has issued the warning. On occasion, foremen have requested that written warnings be issued; however, this request is not "automatic," as Hiland has on some occasions overruled the request and declined to issue written warnings. With both written and oral warnings the record is silent as to specific instances. Foremen have not issued written warnings, and do not have authority to remove discipline from an employee's file; Hiland allowed, however, that although foremen do not have the authority to issue written warnings, foremen *could* issue written warnings on his authority. Foremen give verbal employee performance evaluations to Hiland, who then makes a formal evaluation; the record is silent as to just how much weight Hiland gives a foreman's evaluation, including with regard to employees who, unlike Hiland, work on the night shift. Foremen fill out the weekly timesheets for the Employer. Foremen do not possess authority to adjust employee grievances; they do not have the authority to grant raises, and testimony during the hearing from an employee demonstrated several instances where complaints brought to a foreman's attention were left unaddressed. Also, an employee's testimony at the hearing indicated that a particular foreman's instructions were often ignored; however, the employee was short on specifics.

Since Hiland is present in the facility only during the day shift, at night, foremen are instructed to beep him when problems arise that the foremen cannot handle. Hiland then either remedies the situation by phone, or comes in to correct the problem. The record is devoid of any specifics as to the frequency of this occurring.

Foremen do not have the authority to hire or fire employees. The record discloses one instance of a foreman terminat-

⁵ The shift times for the two shifts fluctuate as follows:

DAY SHIFT	NIGHT SHIFT
Mon.—2-9 p.m.	9 p.m.—6:30 a.m.
Tues.—6:30 a.m.—4 p.m.	4-11 p.m.
Wed.—8 a.m.—4 p.m.	4 p.m.—10:30 a.m.
Thur.—8 a.m.—4 p.m.	4 p.m.—12 a.m.
Fri.—8 a.m.—2:30 p.m.	4 p.m.—12 a.m.

ing an employee, but it was done at Hiland's direction; also, this employee had been terminated (by Hiland) several times in the past, only to be brought back and given another chance. Foremen do not interview applicants for employment, although Hiland indicated that, on some occasions, a foreman will attend an interview with him. Further, the record revealed several instances of a foreman hiring a mailroom employee, but these instances occurred when Hiland was on vacation. During these periods, James Morse, a day-shift foreman, fills Hiland's role.

As with most newspaper operations, the night shift is the most important of the two. As a result, most of the overtime at the Employer's facility is worked by night-shift employees. As Hiland explained, this is because the newspapers have to "get out," and there are deadlines which need to be met. Hiland testified that it is "understood" that employees will stay over when overtime is compelled by the demands of production. Foremen are responsible for soliciting people to work overtime; while foremen are instructed to persuade employees to work overtime, they have no authority to require it. In the event there are not enough press employees to work the overtime, foremen are authorized to ask mailroom employees to stay overtime and work on the press. The record is silent as to what authority foremen possess in the event there are not enough employees to operate the presses on overtime; Hiland offered vague testimony that the foremen make do with "skeleton crews" in some instances.

Foremen make anywhere from \$17.50 to \$19 an hour; assistant foremen earn about \$15 an hour. Foremen do not have offices. They do not wear uniforms different from other employees. Foremen are paid hourly, and receive overtime after a certain amount of hours in a week. Foremen attend management meetings; however, on occasion assistant foremen have attended these meetings as well. Foremen share identical health insurance, vacation, holiday, bereavement pay, and other benefits with other employees, including higher management employees. Foremen do not receive any additional accouterments for their position. Foremen cannot grant employees raises, order supplies, or otherwise pledge the Employer's credit.

Section 2(11) of the Act provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. [Emphasis added.]

The possession of any one of the powers enumerated in Section 2(11) is sufficient to establish supervisory status

since the section is interpreted disjunctively. See, e.g., *Times Herald Printing Co.*, 252 NLRB 278 (1980).

In light of the above, I conclude that the foremen are supervisors under the Act. Specifically, I note that it is clear that the foremen in question exercise independent judgment. Foremen direct the employees on the presses and in the mailroom, independently rotating and reassigning employees to various functions, such as from press to press or from press to mailroom and vice versa, as dictated by production and/or other needs. Foremen permit employees to leave early. The record is clear that foremen give oral warnings to employees on their own, and simply inform Hiland of the action afterwards; there is no evidence that Hiland has ever overruled an oral warning. Further, there is some evidence that foremen have had input in both the hiring and firing process, as indicated above. They also provide oral evaluations to Hiland, including for half of all employees who work on a different shift from Hiland. Accordingly, the foremen herein exercise the requisite independent judgment necessary for a finding of supervisory status. See, e.g., *Atlanta Newspapers*, 306 NLRB 751, 755 (1992); and *McClatchy Newspapers*, 307 NLRB 773, 779 (1992). In so finding, I note that the foremen in the instant case lack some of the secondary indicia sometimes relied upon by the Board in determining supervisory status, such as the absence of additional benefits. See, e.g., *Atlanta Newspapers*, supra. However, as noted, these criteria are merely secondary to the main issue: whether the foremen possess the ability to direct, assign, discipline, and reward the work force, exercising independent judgment. Moreover, I note that, while the benefits enjoyed by foremen are no different from those of unit employees, they are also no different from most management employees, as all the Employer's employees share these benefits.

My finding is further buttressed by the ratio of employees to supervisors if the Employer's position was adopted; specifically, the Employer contends that Hiland is the lone supervisor of the employees in question. The Employer explains that Hiland is able to supervise the night shift by being "on-call." However, if true, this arrangement would result in a ratio of 1:32 for supervisors to employees; in essence, Hiland would be the sole individual responsible for ensuring that the Employer's product gets out in a timely fashion over two shifts, on only one of which he works. Under the circumstances, and noting in particular that the night shift is the more important of the two shifts for the Employer, I find such an arrangement to be inherently unlikely. See *United Electrical*, 279 NLRB 208, 211 (1986). Accordingly, based upon all of the circumstances herein, I find that the foremen possess sufficient supervisory indicia and, therefore, are supervisors within the meaning of Section 2(11) of the Act and are excluded from the unit found appropriate herein.